IN THE

Supreme Court of the United States

October Term, 1950

No. 739

TRANSCONTINENTAL & WESTERN AIR, INC.,
Petitioner,

v.

CARLA PEKELIS, individually and as Administratrix of the goods, credits and chattels which were of Alexander H. Pekelis, deceased,
Respondent.

PETITIONER'S REPLY BRIEF.

Respondent's brief in opposition to the petition for certiorari contains so many unsupported assumptions and implications going to the very issues here involved that it is necessary for your petitioner to file this brief in reply.

1. Initially respondent misstates the question presented by this petition by assuming as established fact the answer to the most important single phase of that question. Throughout the brief respondent assumes that the reports were "the authoritative statement *of the Company*" (p. 2), and states that " * * * *the airline defendant* * * * had finally found that the accident had happened exactly as plaintiff contended" (p. 3). She complains that the reports had

been excluded "on the objection of the defendant *whose reports they were*" (p. 3). She also states, on page 7 of the brief, that the Second Circuit Court had "specifically found" that "these reports * * * were *the Company's* final and definitive statement".

Nothing could be further from the true facts appearing both in the record of the trial and in the opinion of the Court below. Nothing in the case is as clear as the fact that these reports, as appears in the opinion of the Second Circuit Court (R. 641), were *not* in fact Company reports, but reports of company employees submitted to the General Manager and never issued by the Company itself. The main issue is whether such reports were, as a matter of law, reports "of the Company" in the sense that the Company was bound by their contents (R. 641). Respondent, by assuming at the outset that the reports were in fact "the authoritative statement of the Company", ignores the most important issue in the case.

Further illustrating respondent's misinterpretation of the question are the statements appearing on page 5 of the brief where it is said that

> "Petitioner's complaint is that this evidence should have been kept from the jury"

and that

> "Substantially all that is involved is whether on the particular facts of this case, particular pieces of evidence should have been admitted".

Obviously that is not petitioner's contention; what petitioner is contending is that these reports were not evidence.

2. Respondent assumes (p. 5) that this Court will not review "a simple evidence question". It is sufficient to cite

this Court's opinions in *Palmer v. Hoffman,* 318 U. S. 109, and *Insurance Company* v. *Malone,* 21 Wall. 152 (both cited and discussed in the petition) to dispose of this contention. It should also be pointed out that the construction of a Federal Statute, as well as a conflict between the Circuits and with decisions of this Court itself, is also involved.

3. Respondent states (p. 6) that

> "* * * no new principles of law were involved. The [Second Circuit] Court held that these documents were admissions made by the agent of a party acting within the scope of his authority."

Your petitioner has no quarrel with this statement of the holding of the court below, as far as it goes. The decision of the court below, however, was based upon the further holding that such admissions of an agent are binding on his principal. That this holding did involve a "new principle of law" is quite clear when it is contrasted with the statement of this Court in *Insurance Company* v. *Malone,* 21 Wall. 152, 157, that:

> "The opinion of an agent, based upon past occurrences, is never to be received as an admission of his principals."

4. Respondent twice implies (p. 7) that the decision of the court below may be upheld solely on the authority of the decision of the New York Court of Appeals in *Reed* v. *McCord,* 160 N. Y. 330. Quite apart from the fact that that case was cited by Judge CLANCY as authority for the opposite conclusion (Petition, Appendix B, p. 16), it involves the statement of a principal, not of an employee, and is therefore no authority for the admission of the reports involved here. The case was cited by the court below (erroneously, we submit, although the correctness of the citation is not an

issue on this specific point) only for the proposition that the inclusion of opinion will not render the admission of *a principal* inadmissible (R. 642, 643).

5. Respondent implies (p. 8) that the excluded International Division report contains no opinions or conclusions. The next sentence effectively disposes of this argument by stating a conclusion contained in the report: "*that malfunctioning in the plane caused the accident* * * *."

6. On pages 8-10 of her brief, respondent purports to distinguish the facts in the *Lever Bros.* and *Lorber* cases from those in the present case and to show that there is no conflict between them. She does not and cannot dispute the fact that the holdings of the cases, as quoted on pages 11 and 13 of the petition, are squarely in conflict with the principles of law set out by the Second Circuit Court here. Moreover, respondent does not and cannot deny that the opinion below is diametrically opposed to the decision of this Court in *Insurance Co.* v. *Malone,* 21 Wall. 152, cited on page 12 of the petition.

7. Respondent implies (p. 10) that there is no conflict between the decision of the court below and that of the Court of Appeals for the District of Columbia in *New York Life Ins. Co.* v. *Taylor,* 147 F. (2d) 297. She overlooks the fact that in *Buckminster's Estate* v. *Commissioner,* 147 F. (2d) 331, a case cited in the opinion of the court below as applicable to the facts here (R. 645), the existence of a conflict was expressly recognized by the Second Circuit Court:

> "We do not agree with the way in which Hoffman v. Palmer was interpreted in the Taylor case * * *. Since § 695 is a federal statute of general application, its construction by the Court of Appeals of the District of Columbia has no peculiar sanctity, and,

> *as we think that Court's construction was in error,* we hold that it was not binding on the Tax Court." 147 F. (2d) at pages 334, 335. (Emphasis supplied.)

8. Respondent asserts at page 11 that

> "Petitioner simply ignores the whole matter of the error found by the Court of Appeals in the exclusion of the Sigman letter."

Since the court below specifically refused to decide whether this exclusion constituted reversible error (R. 637), and since, in any event, the correctness of the decision of the court below is not yet before this Court, this point is not well taken. It should, however, be pointed out that the holding with reference to the alleged copy of the Sigman letter, which Sigman was unable to identify when he was confronted with it during the trial, is assigned as error (Petition, p. 5). If the writ prayed for is granted, it will be argued that this holding was in error.

9. Finally, although petitioner does not at this time argue the merits of this question, it is necessary to point out that, in the statement of the case contained in respondent's brief, the exclusion of the reports in question is presented as if they were the sole evidence available to plaintiff and the jury. In so doing, respondent completely disregards the evidence which the jury had before it during the lengthy trial of this action, which included the testimony, either by deposition or directly, of several employees of the defendant who were members of the reporting boards and who signed these reports. Further, plaintiff had copies of the reports and disclosure of their contents in advance of the trial. Under the circumstances, if any such witness had departed from statements which he had made in any of these reports, plaintiff could have

used the reports to impeach the witness. In view of this, it is absurd to state as respondent does in her brief that

> "exclusion of these reports * * * permitted the defendant to cripple the court and jury in the search for true facts" (p. 3).

Also ignored by respondent is the fact that the jury with all this evidence before it found wilful misconduct had not been proved.

Respectfully submitted,

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